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E-Filed on May 8, 2009

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SARA L. KISTLER

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

THE RHODES COMPANIES,
aka "Rhodes Homes, et al.,"¹

Debtor(s).

CASE NOS: BK-S-09-14814-LBR
(Jointly Administered)

Chapter 11

Date: May 15, 2009

Time: 10:00 a.m.

Location: Foley Courtroom 1

**THE ACTING UNITED STATES TRUSTEE'S RESPONSE TO THE
APPLICATION FOR AN ORDER UNDER SECTION 327(A) OF THE
BANKRUPTCY CODE AUTHORIZING THE EMPLOYMENT AND**

¹ The Debtors in these cases, along with their case numbers are: Heritage Land Company, LLC (Case No. 09-14778); The Rhodes Companies, LLC (Case No. 09-14814); Tribes Holdings, LLC (Case No. 09-14817); Apache Framing, LLC (Case No. 09-14818); Geronimo Plumbing, LLC (Case No. 09-14820); Gung-ho Concrete, LLC (Case No. 09-14822); Bravo, Inc. (Case No. 09-14825); Elkhorn Partners (Case No. 09-14828); Six Feathers Holdings, LLC (Case No. 09-14833); Elkhorn Investments, Inc. (Case No. 09-14837); Jarupa, LLC (Case No. 09-14839); Rhodes Realty, Inc. (Case No. 09-14841); C & J Holdings, Inc., (Case No. 09-14843); Rhodes Ranch GP (Case No. 09-14844); Rhodes Design & Dev. (Case No. 09-14846); Parcel 20, LLC (Case No. 09-14848); Tuscany Acquisitions, IV, LLC (Case No. 09-14849); Tuscany Acquisitions III, LLC (Case No. 09-14850); Tuscany Acquisitions II LLC (Case No. 09-14852); Tuscany Acquisitions, LLC (Case No. 09-14853); Rhodes Ranch Golf (Case No. 09-14854); Overflow, LP (Case No. 09-14856); Wallboard, LP (Case No. 09-14858); Jackknife, LP (Case No. 09-14860); Batcave, LP (Case No. 09-14861); Chalkline, LP (Case No. 09-14862); Glynda, LP (Case No. 09-14865); Tick, LP (Case No. 09-14866); Rhodes Arizona Properties, LLC (Case No. 09-14868); Rhodes Homes Arizona, LLC (Case No. 09-14882); Tuscany Golf Country Club, LLC (Case No. 09-14884); and, Pinnacle Grading, LLC (Case No. 09-14887).

**RETENTION OF PROVINCE REAL ESTATE ADVISORS, LLC AS WORK-
OUT CONSULTANT TO THE DEBTORS AND DEBTORS IN POSSESSION
NUNC PRO TUNC TO THE PETITION DATE**

The Acting United States Trustee hereby responds to the Application for an Order Under Section 327(a) of the Bankruptcy Code Authorizing the Employment and Retention of Province Real Estate Advisors, LLC as Work-Out Consultant to the Debtors and Debtors in Possession Nunc Pro Tunc to the Petition Date (the "Application"). The supporting declaration of Paul David Huygens, a principal of Province Real Estate Advisors, LLC ("Province"), indicates that Province also provides work-out advice to certain non-debtor affiliates of the Debtors. Accordingly a potential conflict exists in that the Debtors may be found have claims against these non-debtor affiliates. Therefore the Acting United States Trustee requests that the Application be approved on an interim basis, reserving all rights for the Acting United States Trustee in the event an actual conflict arises. This response is supported by the following Memorandum of Points and Authorities, the file and pleadings in this case.

MEMORANDUM OF POINTS AND AUTHORITIES

1. Pursuant to 28 U.S.C. § 586(a)(3), the Acting United States Trustee is charged with responsibility for supervising the administration of cases under Chapters 7, 11, 12 and 13 of the Code. The Acting United States Trustee has standing to raise and to "appear and be heard on any issue in any case or proceeding" brought under the United States Bankruptcy Code² ("Code"). 11 U.S.C. § 307.

2. All debtors commenced their individual cases by filing voluntary petitions under the Code on March 31, 2009, with the exception of Rhodes Homes Arizona, LLC, Case No. 09-14882; Tuscany Golf Country Club, LLC, Case No. 09-14884; and Pinnacle Grading, LLC, Case No. 09-14887, which filed voluntary petitions under the Code on April 1, 2009.

3. No Chapter 11 trustee has been appointed in these cases and the debtors operate as debtors-in-possession.

² 11 U.S.C. § 101 *et seq.*

1 4. These cases are jointly administered under the lead case styled, In re The Rhodes
 2 Companies, Case No. 09-14814-LBR. [Docket Entry # 18]

3 5. The declaration of Paul David Huygens in support of the Application states that
 4 Province is acting as a work-out consultant to certain non-debtor affiliates of the Debtors,
 5 including Sedora Holdings and Sagebrush Enterprises, Inc., which either directly or indirectly
 6 own 100% of all of the Debtors with the exception of Elkhorn Partners, LP, which is 50% owned
 7 by these non-debtor entities. [See Docket # 102, p. 6 of 24, para. 16; Docket # 64, p. 5 of 44]
 8 James M. Rhodes, the founder and president of the Debtors, is also being advised by Province.
 9 [See Docket # 102, p. 6 of 24, para. 16; see also, Docket # 95, p. 2 of 5] Mr. Huygens asserts
 10 that he will not have primary responsibility for the non-debtor work, but that he may have some
 11 involvement in those non-debtor negotiations. [See Docket # 102, p. 6 of 24, para. 17]

12 6. The Application to employ Province is premised upon 11 U.S.C. § 327(a).

13 7. The text of 11 U.S.C. § 327(a) provides generally that the trustee³ may employ
 14 professionals that do not hold or represent an interest adverse to the estate, and are disinterested
 15 persons, to represent or assist the trustee in carrying out the trustee's duties in connection with a
 16 bankruptcy case.

17 8. The disclosures required of a professional seeking employment under 11 U.S.C.
 18 § 327(a) are set forth in FED. R. BANKR. P. 2014(a).

19 9. In addition to the provisions of 11 U.S.C. § 327(a), the issues raised by this response
 20 are premised upon 11 U.S.C. § 327 (c). Section 327 (c) generally provides that while a
 21 professional is not disqualified from employment on behalf of the trustee solely because he or
 22 she represents a creditor, upon objection by the United States Trustee "the court shall disapprove
 23 such employment if there is an actual conflict of interest."

24 10. The policy objectives of 11 U.S.C. § 327 include holding professionals performing
 25 duties for the estate to strict fiduciary standards, and to assure that a professional employed in a
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27 ³The powers of the trustee referred to in 11 U.S.C. § 327 are vested in the various debtors in possession in
 28 these cases. See 11 U.S.C. § 1107(a); see also In re Wheatfield Business Park, LLC, 286 B.R. 412, 418 (Bankr.
 C.D. Cal. 2002) (citing In re Diamond Mortgage Corp., 135 B.R. 78, 88 (Bankr. N.D. Ill. 1990)).

1 bankruptcy case will devote undivided loyalty to the client. In re Wheatfield Bus. Park, LLC,
 2 286 B.R. 412, 417-18 (Bankr. C.D. Cal. 2002) (*citing* In re Envirodyne Indus., Inc., 150 B.R.
 3 1008, 1016 (Bankr. N.D. Ill. 1993) *and* In re Lee, 94 B.R. 172, 178 (Bankr. C.D. Cal. 1988)).
 4 "Having to divide one's allegiance between two clients is what Section 327 attempts to prevent."
 5 In re Mercury, 280 B.R. 35, 54 (Bankr. S.D.N.Y. 2002) (*quoting* In re Roger J. Au & Son, Inc.,
 6 101 B.R. 502, 505 (Bankr. N.D. Ohio 1989)).

7 11. In the event that the Debtors have claims against their non-debtor affiliates Province
 8 may have a conflict of interest.⁴

9 12. Pursuant to 11 U.S.C. § 327, the existence of a "potential conflict of interest may
 10 also require the disqualification of a professional if, in the judgment of the court, the conflict is
 11 sufficiently important and there is a sufficient likelihood that it will ripen into an actual conflict."
 12 Wheatfield, 286 B.R. at 420-21 (*citing* In re Amdura, 121 B.R. 862, 865-68 (Bankr. D. Colo.
 13 1990)).

14 13. The standard under 11 U.S.C. § 327 is very high: "If there is any doubt as to the
 15 existence of a conflict, that doubt should be resolved in favor of disqualification." Wheatfield,
 16 286 B.R. at 418 (*citing* Lee, 94 B.R. at 177).

17 14. However, some courts have recognized "the substantial cost of requiring additional
 18 trustees or counsel in cases where individual debtors have claims against each other, have taken
 19 a 'wait and see,' fact-driven, approach, to determine the extent to which [disqualification] is
 20 necessary." *See, e.g., In re Adelphia Communications Corp.*, 336 B.R. 610, 673 (Bankr.
 21 S.D.N.Y. 2006). Such a wait and see approach appears to be appropriate here, where the cases
 22 were only recently filed, the schedules were filed on April 30, 2009 and there may be claims
 23 between the Debtors and the non-debtor entities.

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 27 ⁴ Mr. Huygens' declaration state that the First Lien Steering Committee has already
 28 raised this possibility although the non-debtor entities dispute those allegations.
 [Docket # 102, p. 6-7 of 24, para. 19]

1 **WHEREFORE**, the Acting United States Trustee requests that if the Court approves the
2 Application, the Court approve it on an interim basis.

3 Dated: May 8, 2009

4 Respectfully submitted,

5 **THE UNITED STATES TRUSTEE**

6 By: /s/ Edward M. McDonald Jr.
7 Edward M. McDonald Jr., Esq.
8 Attorney for the United States Trustee
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CERTIFICATE OF MAILING

I, the undersigned, hereby certify and declare that I deposited a true and correct copy of this response in first class United States mail, postage fully prepaid, and, if a facsimile number is listed, by facsimile, on this date to each of the parties listed below:

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Dated: May 8, 2009

OFFICE OF THE UNITED STATES TRUSTEE

By: /s/ Edward M. McDonald Jr.
An Authorized Employee of the United States Trustee